INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXVIII, NO. 8 **March 16, 2001**

CRIMINAL LAW ISSUES

MITCHELL v. STATE, No. 49S00-0006-CR-363, ___ N.E.2d ___ (Ind. Mar. 7, 2001).
BOEHM, J.

On appeal, Mitchell claims that, although the instruction is a correct statement of the law, it "is not a complete and fair statement of Indiana law" and misled the jury. Specifically, he claims that the instruction did not tell the jury that mere presence or acquiescence is not enough and that there must be evidence of a defendant's affirmative conduct.

This Court has recently held that a defendant is ordinarily not required to tender proposed alternative instructions to preserve a claim of error. Scisney v. State, 701 N.E.2d 847, 848 (Ind. 1998). Specifically, this Court concluded that, although a defendant is not generally required to tender an alternative instruction when objecting to a proposed instruction, the "instruction objection at trial [must be] sufficiently clear and specific to inform the trial court of the claimed error and to prevent inadvertent error." Id. However, if the claimed error is failure to give an instruction, "a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request." [Citation omitted.] Under these rules, Mitchell has waived any error in the jury instruction.

Mitchell's objection at trial did not make clear that he was objecting based on missing information in the proposed instruction. Rather, his objection appeared to be based on whether there was evidence in the record to support the third paragraph of the instruction. [Footnote omitted.] [Citation omitted.] However, even if the objection could somehow be construed to complain about missing information, in order to preserve this objection, it was necessary to propose an alternative instruction containing the additional law. Because Mitchell failed to do that, he has waived this claim. [Footnote omitted.]

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

DEARMAN v. STATE, No. 49S00-9908-CR-422, ___ N.E.2d ___ (Ind. Mar. 9, 2001).
RUCKER, J.

The trial court expressed its belief that there was a serious evidentiary dispute concerning whether Dearman acted under sudden heat . . . . However, the trial court refused to give Dearman's tendered instruction on voluntary manslaughter relying on this Court's decision in Battles v. State, 688 N.E.2d 1230 (Ind. 1997). In that case, we held that the defendant was not entitled to an instruction on the defense of accident when the only evidence introduced at trial to support such a defense was the defendant's own out-of-court statement. Id. at 1234. Specifically, we declared "[A] defendant cannot make exculpatory

statements outside court, present no evidence in defense, preclude the state from cross-examining the assertions, and then be entitled to have the self-serving statements constitute substantive evidence supporting an instruction on the defense of accident." [Citation omitted.]

Here, the record shows that Dearman elected not to testify or present evidence on his own behalf. The only evidence of alleged sudden heat was contained in Dearman's out-of-court statement to police, which the State introduced at trial. . . .

The quote in Battles on which the trial court relied was part of a larger quote in which we declared:

> While a criminal defendant has the constitutional right not to testify at trial, *the defendant has the burden of proof on any affirmative defense*. . . .

[Citation omitted.] Unlike the defense of accident, mitigation in the form of sudden heat is not an affirmative defense on which the defendant bears an initial burden of proof by a preponderance of the evidence. Instead, the defendant bears no burden of proof with respect to sudden heat, but only bears the burden of placing the issue in question where the State's evidence has not done so. Bradford v. State, 675 N.E.2d 296, 300 (Ind. 1996) . . . . In this case, the State's evidence placed the question of sudden heat before the jury. Dearman had no further obligation on this point, and if the evidence was sufficient to raise a serious evidentiary dispute, then he was entitled to a jury instruction on the lesser offense of voluntary manslaughter. . . .

. . . .

SHEPARD, C. J., and BOEHM, and SULLIVAN, JJ., concurred.
DICKSON, dissented without filing a separate written opinion.

JOHNSON v. STATE, No. 71S03-0009-CR-529, ___ N.E.2d ___ (Ind. Mar. 9, 2001).
RUCKER, J.

When a person utters what can only charitably be called fighting words, then displays a handgun, and next says "don't even think it," we conclude the person has communicated a threat within the meaning of the intimidation statute. We therefore grant transfer and affirm the trial court.

. . . Kreczmer rolled down his window and told Johnson that the traffic light was green and that he wanted to go. Johnson responded, "F*** you." R. at 30. Again, Kreczmer told Johnson that the traffic light was green, that the Tempo was obstructing traffic, and that he wanted to go. This time Johnson replied, "Suck my d***." R. at 30. When Kreczmer started to exit his car, Johnson lifted his jacket revealing the top of an automatic handgun and stated, "Don't even think it." [Citation to Record omitted.] . . .

. . . Citing Gaddis v. State, 680 N.E.2d 860 (Ind. Ct. App. 1997), as dispositive controlling authority, the Court of Appeals reversed in a two to one decision finding the evidence insufficient to sustain the conviction. Johnson v. State, 725 N.E.2d 984 (Ind. Ct. App. 2000) (Kirsch, J., dissenting). [Footnote omitted.] . . .

. . . Gaddis and the other motorist, each apparently troubled by the other's driving, pulled beside one another, exchanged hand gestures, and spoke to each other through closed windows. Gaddis then "removed his handgun from the glove box, displayed it by the window at a 45-degree angle, and placed it near the console." [Citation omitted.] Gaddis was subsequently convicted of intimidation. On review, the Court of Appeals vacated the conviction, holding "the mere display of a handgun does not express an intention to unlawfully injure a person or his property." Id. at 862. We agree with this general proposition. However, the State did not seek transfer in Gaddis, and accordingly, this Court had no opportunity to evaluate whether the facts in that case demonstrated that the defendant went beyond the "mere display" of a handgun. In any event, we observe that

introducing a handgun into an emotionally charged environment can easily lead to a physical confrontation with tragic consequences. . . . [W]here as here the record shows the existence of words or conduct that are reasonably likely to incite confrontation, coupled with the display of a firearm, we are hard pressed to say that such facts are insufficient to prove that a threat has been communicated within the meaning of the intimidation statute.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

LONG v. STATE, No. 28S00-9907-CR-388, ___ N.E.2d ___ (Ind. Mar. 9, 2001).

DICKSON, J.

Long contends that the trial court erroneously allowed FBI Agent Dunn, a testifying witness, to remain in the courtroom throughout the trial. The defense requested, and the trial court ordered, a separation of witnesses pursuant to Indiana Evidence Rule 615, which provides:

> At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

The trial court permitted the prosecutor to retain at counsel table both Indiana State Police Trooper Daniel Conley as an officer of the State (under clause (2)) and FBI Agent Gary Dunn as a person essential to the presentation of the State's case (pursuant to clause (3)).

. . .

The basic premise of Rule 615 is that, upon request of any party, witnesses should be insulated from the testimony of other witnesses. To serve this general objective, the rule's exceptions should be narrowly construed and cautiously granted. A party seeking to exempt a witness from exclusion as "essential to the presentation of the party's cause" under clause (3) must convince the trial court that the "witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney would not effectively function without the presence and aid of the witness." [Citation omitted.] An exclusion under clause (3) would thus be inappropriate in cases where a person excluded under clauses (1) or (2) can provide the expertise and knowledge adequate to assist counsel. Likewise, permitting a party to retain more than one witness in the courtroom under clause (3) to assist during trial would be especially questionable.[6] . . .

. . . In requesting Agent Dunn's exception as "essential" under Rule 615, the State explained that Trooper Conley and Agent Dunn had divided many of the responsibilities of the investigation, often working separately, particularly when interviewing witnesses in Ohio and Illinois. As noted by Long, "forty-five non-police, non-expert witnesses testified for the State," thirteen search warrants were issued, and sixty-six exhibits were offered into evidence by the State. [Citation to Brief omitted.] In preparation for this seven-day trial, the police conducted over 500 witness interviews and executed thirty searches during three to four years of police work covering leads in Ohio, Illinois, and Indiana.

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[6] In Vinson v. State, 735 N.E.2d 828, 831 (Ind. Ct. App. 2000), the Court of Appeals approved the retention of two police officer witnesses at counsel's table during the trial notwithstanding a separation of witnesses order. Construing the Rule 615 exceptions generously instead of narrowly, the court stated that "if a witness falls within one of the exemptions enumerated under Indiana Evidence Rule 615, that witness shall be allowed to remain in the courtroom." Id. Although we declined to grant transfer in Vinson, we disapprove of its treatment of the Rule 615 issue.

Notwithstanding the important purpose of Rule 615 to minimize prospective witnesses from exposure to the testimony of other witnesses and our preference that the rule's exceptions be narrowly construed and cautiously granted, we decline to find that the trial court abused its discretion in finding Agent Dunn within the Rule 615 exception for persons essential to the presentation of the prosecutor's case.

. . . .

SHEPARD, C. J., and BOEHM, and RUCKER, JJ., concurred.
SULLIVAN, J., concurred, except as to Footnote 6.

MAYES v. STATE, No. 49S00-0002-CR-92, ___ N.E.2d ___ (Ind. March 13, 2001).
RUCKER, J.

Mayes sought a self-defense instruction at trial, but over his objection the trial court instructed the jury as follows:

> The defense of self-defense is defined by law as follows:
>
> A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony. No person in this State shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary.
>
> A person is not justified in using force if:
>
> 1. He is committing, or is escaping after the commission[] of[,] a crime;
> . . . .

[Citation to record omitted.] Mayes acknowledges that the instruction tracks the language of the self-defense statute nearly verbatim. [Citation omitted.] . . .

. . . .

A literal application of the contemporaneous crime exception would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process. A similar view was expressed by our Court of Appeals in a case very similar to the one before us. In Harvey v. State, 652 N.E.2d 876 (Ind. Ct. App. 1995), the defendant shot the victim with an unlicensed firearm and claimed self-defense in the fatal shooting. The trial court instructed the jury, "A person who is not in his home or fixed place of business and is carrying a handgun without a license cannot by law claim the protection of the law of self defense." [Citation to record omitted.] . . . Writing for the court, Judge Garrard observed:

> If subsection (d)(1) [of Indiana Code § 35-41-3-2] is to be taken literally, then no person may claim self defense if that person at the time he acts is coincidentally committing some criminal offense. For example, possession of a marijuana cigarette or the failure to have filed one's income tax returns could deny one the defense no matter how egregious, or unrelated, the circumstances that prompted the action. Read as a whole, the statute refutes such a construction.

[Citation omitted.] . . .

We also observe that as applied to the facts of this case, if Mayes had previously obtained a valid license but it had expired one minute before he shot his girlfriend, then, if the statute is to be read literally, a self-defense claim would be unavailable. The legislature could not have intended that a defense so engrained in the jurisprudence of this State be dependent upon the happenstance of such timing.

We conclude that because a defendant is committing a crime at the time he is allegedly defending himself is not sufficient standing alone to deprive the defendant of the defense of self-defense. Rather, there must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred. [Citation omitted.] . . .

. . . .

SHEPARD, C. J., and SULLIVAN, J., concurred.

BOEHM, J., filed a separate written opinion in which he concurred in the result and in which DICKSON, J. concurred, in part as follows:

I agree that the conviction should be affirmed for the reasons given by the majority in footnote two of its opinion. [I] do not agree that the instruction was a correct statement of the law. . . . [T]he recitation of the naked statutory language was not a proper statement of "the law."

I also believe that it is not proper to affirm the conviction here on the ground that the jury could have determined that there was a causal connection between Mayes' illegal possession of a weapon and his confrontation with the victim. If the jury had been properly instructed that there must be such a connection to negate self-defense, then I would affirm. But there was no instruction that a finding of a causal connection between the illegal activity and the confrontation was required. Accordingly, we have no basis to conclude that the jury made that finding.

. . . I am concerned that this "but for" test is too broad. There are many situations where "but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred," but where the defense of self-defense should be available. . . . The defendant is illegally gambling and a fight erupts because the victim believes the defendant is cheating. This leads to the victim's death. Under these circumstances, the defendant should be free to claim self-defense. Similarly, if the victim attempts to take marijuana from the defendant and it leads to an altercation and the victim's death, self-defense should be available. In either case, the majority's "but for" test may be thought to be satisfied, and, if so, the defendant would be precluded from raising self-defense. . . .

. . . I suggest it would be preferable to phrase the issue as whether there is "an immediate causal connection" between the aspect of the defendant's activity that renders it criminal and the confrontation. [Footnote omitted.] . . .

STATE v. BILBREY, No. 18A04-0010-CR-433, ___ N.E.2d ___ (Ind. Ct. App. Mar. 6, 2001).

RILEY, J.

Appellant-Plaintiff, State of Indiana (State), appeals the trial court's grant of Appellee-Defendant's, Johnny Bilbrey (Bilbrey), motion to dismiss the charges of operating a vehicle after lifetime suspension, a Class C felony, Ind. Code § 9-30-10-17, and operating a vehicle while intoxicated, a Class A misdemeanor, Ind. Code § 9-30-5-2.

We reverse.

. . . .

On November 4, 1999, Michael Atkins (Atkins) heard a loud noise outside of his home. Atkins went outside and saw that a truck had run into a tree in his backyard. Atkins also saw Bilbrey standing near his next-door-neighbor's house.

. . . .

[B]ilbrey filed a motion to dismiss the charges of operating a vehicle after lifetime suspension and operating a vehicle while intoxicated. Bilbrey argued that he was not operating a vehicle on the day of the alleged offenses. . . . The trial court held:

> [I] really do not see any factual issue. There just is not before the Court, other than simply the allegation that he may have, uh, operated the motor vehicle. There doesn't seem to be any evidence before the Court to back that up. . . .

[Citation to Record omitted.]

. . . .

Bilbrey maintains that the State's mere assertion that he was operating the vehicle at the time of the accident was not sufficient to preclude dismissal of the informations. In support of his argument, Bilbrey cites to *D.M.Z.* In *D.M.Z.*, the State filed an information which alleged that on three separate occasions, D.M.Z. had engaged in sexual conduct with C.P. in violation of the child seduction statute. *D.M.Z.*, 674 N.E.2d at 587. D.M.Z. moved to dismiss the charges on several grounds: (1) D.M.Z. was not C.P.'s custodian, (2) the Shelter was not a foster care facility, and (3) the child seduction statute was unconstitutionally vague. [Citation omitted.] . . . The trial court concluded that as a matter of law, D.M.Z. was not C.P.'s custodian and that the Shelter was not a foster care facility. [Citation omitted.] On appeal, this court found that the trial court accepted all the material facts in the information as true but concluded that the information did not establish, as a matter of law, that D.M.Z. was a "custodian" within the meaning of the child seduction statute. [Citation omitted.] . . .

The present case is distinguishable from *D.M.Z.* In *D.M.Z.*, the defendant did not fall within the meaning of a "custodian" as a matter law. [Citation omitted.] The court based its reasoning on statutory law and legislative intent. [Citation omitted.] Here, the question of whether Bilbrey operated a motor vehicle is a question of fact. . . .

. . . .

DARDEN and ROBB, JJ., concurred.

BRINGLE v. STATE, No. 41A04-0006-CR-240, ___ N.E.2d ___ (Ind. Ct. App. Mar. 6, 2001).

VAIDIK, J.

Bringle contends that his conviction for Refusal to Identify Self was not supported by sufficient evidence. To convict Bringle of Refusal to Identify Self as a class C misdemeanor, the State was required to prove beyond a reasonable doubt that Bringle (1) knowingly or intentionally; (2) refused to *provide* a law enforcement officer who had stopped him for an infraction or ordinance violation, (3) with either his name, address, and date of birth or his driver's license, if in his possession. IND. CODE § 34-28-5-3.5. . . .

Bringle suggests that his action of holding up his license to the window of his vehicle fulfilled his obligation under Indiana Code section 34-28-5-3.5. . . .

. . . [W]e find that Indiana Code section 34-28-5-3.5 requires that a person either supply a law enforcement officer with his name, address, and date of birth, or physically hand over his license, if it is in his possession.[4] . . .

. . . .

[4] Because we find that Bringle provided neither his driver's license nor his name, address and date of birth to the deputies, we need not reach the issue of whether the legislature intended a person who is in possession of his license, but instead chooses to give a law enforcement officer his name, address, and date of birth, would violate Indiana Code section 34-28-5-3.5.

KIRSCH and NAJAM, JJ., concurred.

SPEARMAN v. STATE, No. 49A04-0006-CR-261, ___ N.E.2d ___ (Ind. Ct. App. Mar. 6, 2001).

KIRSCH, J.

Nathaniel Spearman appeals his conviction for unlawful possession of a firearm by a serious violent felon, [footnote omitted] a class B felony. On appeal he raises the following issue, which we restate as: whether the trial court violated Spearman's rights to due

process under the Fourteenth Amendment to the United States Constitution when it denied Spearman's motion to bifurcate portions of the proceedings.

. . . .

Because Spearman had a previous conviction for criminal confinement, the State charged him with unlawful possession of a firearm by a serious violent felon. [Footnote omitted.] . . .

[S]pearman moved for bifurcated proceedings so that the jury would not be told of his criminal confinement conviction before it determined whether he was in possession of a firearm. The trial court denied the motion. . . .

. . . .

Spearman's bifurcation argument rests, in part, on our court's approval of bifurcation when a defendant is charged as an habitual offender and in cases where prior convictions serve to elevate a present crime or enhance the penalty for a present conviction. [Citations omitted.] . . .

[T]he rationale for inadmissibility of prior convictions breaks down when the evidence of the prior conviction not only has the "tendency" to establish guilt or innocence but also is essential to such determination. . . .

. . . The legal status of the offender is an essential element of the crime, and the act—the possession—is illegal only if performed by one occupying that status. This is a very different situation from one in which the act itself is illegal without regard to the status of the offender, from one where the level of the illegal act is elevated based upon the offender's status, and from one where the punishment for the illegal act is enhanced based upon the offender's status. . . .

. . . .

[T]he federal courts have addressed the balance between evidence that is both probative and prejudicial by encouraging proof of a prior felony element through a redacted record, testimony by a clerk, stipulation, a defendant's affidavit or other similar technique whereby the jury is informed only of the fact of the prior felony conviction, but not of the nature or substance of the conviction. [Citation omitted.] . . .

. . . .

As these cases reveal, the trial court in exercising its discretion under Ind. Evidence Rules 403 and 611 can mitigate the prejudicial effect of evidence of a prior conviction by excluding evidence regarding the underlying facts of the prior felony and limiting prosecutorial references thereto. . . . Here, the probative value of the evidence is essential to the proceeding and any prejudice to Spearman was minimized by allowing him to stipulate to the fact that he was convicted of the underlying felony of criminal confinement.

In this appeal, Spearman does not assert that his substantive due process rights were violated by the legislature's decisions to refer to the designated group of felonies as "serious violent felonies" and to the crime as possession by a "serious violent felon." We reserve such issue for another day. Nevertheless, while we hold that the element of the prior felony cannot be bifurcated from the possession element in a prosecution under IC 35-47-4-5, we are at the same time mindful of the prejudice that may arise in a jury trial when a defendant is identified and repeatedly referred to as a "serious violent felon." We urge trial courts to be attentive to this potential for prejudice and to exercise their discretion in crafting instructions and referring to the prior felony in ways which minimize the potential for such prejudice.[8]

[8] For example, trial courts may determine to reference the predicate felony as one "enumerated under IC 35-47-4-5" rather than as a "serious violent felony."

FRIEDLANDER, J. concurred.

DARDEN, J., filed a separate written opinion in which he concurred in part and in which he dissented, in part, as follows:

I would respectfully disagree with the majority's interpretation of the statute. I believe that without bifurcation, the statute is unconstitutional as applied in this case. Because the accused is clothed with a presumption of innocence, it is antithetical to our system of jurisprudence to label one accused of a crime as a "serious violent felon" during proceedings to determine guilt. By labeling the accused a "serious violent felon" [footnote omitted] from the outset and for the duration of the proceedings, it is a likelihood - almost a certainty - that the jury will lose sight of the statute's foundational elements: whether the accused knowingly or intentionally possessed a firearm. [Citation omitted.]

. . . .

ALLEN v. STATE, No. 59A01-0004-CR-123, ___ N.E.2d ___ (Ind. Ct. App. Mar. 7, 2001).
SULLIVAN, J.

[F]lick stopped by Osborn's, where the tow-truck driver, Phillip Weeks, told Flick that Allen had displayed a pistol to him earlier that day. The next morning, Flick and Lobosky discussed Allen's parole status and Lobosky called Jason Thornberry, Allen's parole officer to inform him that Allen had been seen with a firearm. Allen was forbidden from possessing firearms as a condition of his parole. Thereafter, Thornberry, accompanied by Flick and Lobosky, went to Allen's home to conduct a search. Thornberry asked Allen for permission to search the house, and Allen consented. When Thornberry asked if Allen had any firearms, Allen indicated that he did. [Footnote omitted.]

. . . .

"[A]ffording probationers lesser protections is predicated on the premise that probation officers, or police working with probation officers, are conducting searches connected to the enforcement of conditions of probation and not for normal law enforcement purposes." [Citation omitted.] . . . The State must demonstrate that a warrantless search of a probationer was a true probationary search and not an investigatory search. [Citation omitted.] [C]ourts must conduct a bifurcated inquiry. First, a court should determine whether the search was indeed a parole or probation search. If the search was not conducted within the regulatory scheme of parole/probation enforcement, then it will be subject to the usual requirement that a warrant supported by probable cause be obtained. If the search is a true parole/probation search, then a court must determine whether the search was reasonable.

. . . .

In the present case, Allen was seen by Weeks in possession of a firearm. When this information was relayed by the police to Thornberry, he conducted a search with the assistance of the police to determine whether Allen had violated the terms and conditions of his parole agreement. We hold that this information was sufficient cause to conduct a parole search of Allen's home. When the police told Thornberry that Allen had been seen with a firearm, reasonable suspicion existed, and the probation search of Allen's home was reasonable within the meaning of the Fourth Amendment. [Citations omitted.] . . .

. . . .

BROOK and NAJAM, JJ., concured.

VESTAL v. STATE, No. 11A04-0003-CR-121, ___ N.E.2d ___ (Ind. Ct. App. Mar. 7, 2001).
VAIDIK, J.

Vestal argues that the trial court erred in ordering Vestal to pay Clay County for extradition costs. The trial court in sentencing Vestal stated that "[c]ourt orders defendant to make restitution to Rick James in the sum of $496.68, Clay County Extradition Expenses in the sum of $1,472.35. Court finds he should further reimburse Clay County Public Defender Fund in the amount of $1,250.00." [Citation to Record omitted.] Vestal relies on Ind. Code § 35-50-5-3 which provides that restitution may be ordered to the victim, the

victim's estate, or the family of a victim who is deceased. He then argues that Clay County was not a victim of his crime and thus he cannot be ordered to pay restitution to the county. We would agree with Vestal if the order to pay Clay County for his extradition costs were indeed a restitution cost.

However, the trial court ordered Vestal to reimburse Clay County for his extradition, not pay restitution. Two police officers from Brazil, Indiana, were sent to Louisiana to escort Vestal back to Indiana. The cost of the trip for the two officers was $1,472.35. The State requested reimbursement for the costs and the court granted the order. Record at 81. Ind. Code § 35-33-14-1 states that a county extradition fund exists in each county. The purpose of this fund is to offset the costs of extraditing criminal defendants. Ind. Code § 35-33-14-2. Here, we presume the Clay County Extradition Fund was used to offset the costs of extraditing Vestal to Indiana. Thus, the order from the trial court to pay back money to this fund is considered a reimbursement of costs and not restitution.

. . . .

KIRSCH and NAJAM, JJ., concurred.

DIEDRICH v. STATE, No. 50A05-0009-PC-370, ___ N.E.2d ___ (Ind. Ct. App. Mar. 12, 2001).
SULLIVAN, J.

On July 17, 1998, the Marshall Superior Court issued a warrant for Diedrich's arrest in connection with a robbery. Diedrich was eventually arrested in September of 1998 and released on bond a week later. When Diedrich failed to appear at a pre-trial conference on December 16, 1998, another warrant was issued for his arrest on December 29, 1998. On January 6, 1999, the Marshall Superior Court received notice from the Indiana Department of Correction (IDOC) that Diedrich was already in the department's custody on an unrelated offense, ... By way of fax, the Marshall Superior Court learned that the IDOC had received the warrant and that Diedrich had been informed that a detainer had been filed against him.

Pursuant to an order issued by the Marshall Superior Court, Diedrich was transported from the IDOC to the Marshall County Jail during the week of July 11, 1999, and held there pending further order. [D]iedrich . . . was sentenced to eight years incarceration and awarded 64 days for time served prior to sentencing.[1] Diedrich later filed a Petition to Correct Presentence Jail Credit with the Marshall Superior Court, claiming that he should have been awarded "full credit" for the time spent incarcerated in the IDOC. . . .

. . . .

When a defendant is incarcerated on multiple unrelated charges at the same time, it is possible that a period of confinement may be the result of more than one offense. Dolan, 420 N.E.2d at 1373. In such a case, the defendant may receive a "full credit" on each sentence, ... According to Diedrich, while incarcerated in the IDOC on the unrelated charges, he was also being detained as a result of the Marshall County offense following service of the warrant on January 6, 1999. Thus, he claims that he is entitled to "full credit" on each sentence . . . . According to Diedrich, while incarcerated in the IDOC on the unrelated charges, he was also being detained as a result of the Marshall County offense following service of the warrant on January 6, 1999. Thus, he claims that he is entitled to "full credit" on each sentence.

[D]iedrich relied primarily upon Muff v. State, 647 N.E.2d 681 (Ind. Ct. App. 1995), trans. denied. [Citation to Record omitted.] In Muff, the defendant was arrested for forgery on July 15, 1993, and released the following day after posting bond. On August 24, 1993, the

[1] It appears that the 64 days consisted of the one week Diedrich spent incarcerated in September of 1998, and the period of incarceration in the Marshall County Jail following his transfer from the IDOC.

defendant was arrested on unrelated charges. As a result, the defendant's bond on the forgery was revoked on September 8, 1993, while he was still incarcerated. The trial court noted that the sentences were to be served consecutively . . . .

. . . .

The holding in Muff has been criticized for failing to recognize that awarding "full credit" on each sentence, when the sentences must be served consecutively, enables a defendant to serve part of his sentences concurrently, a result the legislature could not have intended. In Stephens v. State, 735 N.E.2d 278 (Ind. Ct. App. 2000), trans. denied, for example, the court, although acknowledging that the defendant in Muff had indeed received a "full credit" toward each sentence, declined to follow that holding because of a subsequent Supreme Court decision, Corn v. State, 659 N.E.2d 554 (Ind. 1995). In particular, the Stephens court noted that the defendant in Corn, who was incarcerated on one offense while awaiting trial on a subsequent offense, unsuccessfully argued that he was entitled to a "full credit" on each offense for the same period of incarceration. [Citation omitted.] The court in Stephens further noted that our Supreme Court reasoned that allowing a "double credit" would be contrary to the legislative mandate that the two sentences be served consecutively. [Citation omitted.] . . .

In this case, Diedrich too was required to serve his sentences consecutively because he committed the second offense while on bond. [Citation omitted.] Thus, for the reasons set forth in Stephens and Corn, we decline to follow Muff. We also note that the two cases relied upon by the court in Muff do not support the result reached in that case. . . .

. . . .

For the reasons discussed, we hold that Diedrich was entitled to credit against only one of his sentences for the period of incarceration in question. While it is not clear from the record whether Diedrich received credit toward his Starke County offense for the period of incarceration in the IDOC, Diedrich does not claim that he did not. Further, based upon Diedrich's reliance upon Muff and his argument that he is entitled to "full credit" on each offense, it is reasonable to conclude that he did.[2] Therefore, regardless of whether it could be argued that Diedrich spent time incarcerated in the IDOC under the Marshall County warrant,[3] Diedrich is not entitled to a "full credit" on each offense. . . .

. . . .

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[2] In any event, we note that "the details of orchestrating the service of consecutive sentences from different courts is a matter of administrative prerogative for the Department of Correction." Grayson v. State, 593 N.E.2d 1200, 1208 (Ind. Ct. App. 1992) (Sullivan, J., dissenting). Thus, while it is clear that Diedrich is entitled to credit against one of the sentences, the Department of Correction is ultimately responsible for the calculation of Diedrich's jail time credit and release date.

[3] While the State suggests that this issue may be resolved by determining whether the time served was the result of the offense for which the defendant was sentenced, such an inquiry alone does not resolve the issue of jail time credit. Compare Bischoff v. State, 704 N.E.2d 129 (Ind. Ct. App. 1998) (concluding that time served under a warrant was not the result of the offense for which the warrant was issued), trans. denied, with Stephens, 735 N.E.2d at 284 (noting that time served following defendant's arrest for burglary while incarcerated on an unrelated charge, was properly allocated to sentence for burglary, not the unrelated charge). As the cases illustrate, time spent incarcerated under a warrant may reasonably be allocated to either offense or both. Thus, it appears that the critical inquiry is whether the case involves mandatory consecutive sentences, which limit the defendant to only one credit for the period of incarceration in question. Bischoff, 704 N.E.2d at 130; Stephens, 735 N.E.2d at 284.

SHARPNACK, C. J., and MATHIAS, JJ., concurred.

PECKINPAUGH v. STATE, No. 48A02-0005-CR-318, ___ N.E.2d ___ (Ind. Ct.. App. Mar. 13, 2001).

FRIEDLANDER, J.

Peckinpaugh contends that his multiple convictions for stalking violate constitutional double jeopardy principles. Specifically, Peckinpaugh notes that the offense of stalking contemplates a series of acts, and contends that double jeopardy principles prevent the State from dividing a larger series of acts into multiple smaller series for the purpose of obtaining multiple convictions. . . .

The parties do not direct our attention to an Indiana case addressing this issue, nor does our research reveal one. . . .

. . . .

We hold that, in Indiana, a defendant may be convicted of separate counts of stalking the same victim if the respective series of incidents upon which the charges are based can be divided into distinct and separate series. In the instant case, Peckinpaugh harassed Fillmore for a period of months, culminating in the December 6 break-in. After charges were filed and Peckinpaugh was ordered to stay away from Fillmore and refrain from contacting her, he violated the terms of that order and began once again to contact Fillmore and to violate the restrictive physical boundaries he was ordered to observe.

. . . .

BAILEY and MATTINGLY, JJ., concurred.

CIVIL LAW ISSUES

G & N AIRCRAFT, INC. v. BOEHM, No. 45S05-0003-CV-221, ___ N.E.2d ___ (Ind. Mar. 2, 2001).

BOEHM, J.

This case deals with the obligations of a majority shareholder in a close corporation and the remedies available to a minority shareholder for breach of those duties.

. . . .

A direct action is "[a] lawsuit to enforce a shareholder's rights against a corporation." [Citation omitted.] This action may be brought in the name of the shareholder "to redress an injury sustained by, or enforce a duty owed to, the holder." [Citation omitted.] Direct actions are typically appropriate to enforce the right to vote, to compel dividends, to prevent oppression or fraud against minority shareholders, to inspect corporate books, and to compel shareholder meetings. [Citation omitted.]

Derivative actions, on the other hand, are suits "asserted by a shareholder on the corporation's behalf against a third party . . . because of the corporation's failure to take some action against the third party." [Citation omitted.] They are brought "to redress an injury sustained by, or enforce a duty owed to, a corporation." [Citation omitted.] . . .

Some courts and commentators, and indeed the defendants in this case, would distinguish between direct and derivative actions based on whether the shareholder or the corporation has been injured. [Citation omitted.] . . .

Some courts allow a direct action only if the shareholder's injury is distinct from the injuries sustained by other shareholders and the corporation. [Citation omitted.] . . .

Still other courts take a categorical approach to distinguishing between direct and derivative lawsuits and look to past judicial decisions to label a claim as either direct or derivative depending on what previous courts have done in awarding the requested relief. [Citations omitted.] . . .

We believe that the correct approach draws the distinction based on the rights the shareholder asserts. Under this view, a direct action may be brought when:

> it is based upon a primary or personal right belonging to the plaintiff-stockholder . . . . It is derivative when the action is based upon a primary right of the corporation but which is asserted on its behalf by the stockholder because of the corporation's failure, deliberate or otherwise, to act upon the primary right.

Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106, 112 (S.D.N.Y. 1951). . . .

The distinction between direct and derivative actions has been complicated in more recent years by recognition in many jurisdictions, including Indiana, of direct actions by shareholders in close corporations for derivative claims. In 1995, this Court held that a shareholder in a close corporation need not always bring claims of corporate harm as derivative actions. Rather, in such an arrangement, the shareholders are more realistically viewed as partners, and the formalities of corporate litigation may be bypassed. Barth v. Barth, 659 N.E.2d 559, 561 & n.6 (Ind. 1995). The Court, following the American Law Institute's Principles of Corporate Governance section 7.01(d), held that a shareholder of a close corporation may proceed against a fellow shareholder in a direct action if that form of action would not: (1) unfairly expose the corporation or the defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the corporation, or (3) interfere with a fair distribution of the recovery among all interested persons. [Citation omitted.] . . .

. . . .

Boehm's claims fall into three basic categories: (1) Goldsmith as an officer and director breached his fiduciary duties to the corporation; (2) Goldsmith as an officer and director breached his fiduciary duties to Boehm as a shareholder; and (3) Goldsmith as a majority shareholder in a closely held corporation breached his fiduciary duties to Boehm. . . .

. . . .

In sum, the reasons for requiring a shareholder to pursue claims as a derivative action are not present in this case. The plaintiff is one of three shareholders. Of the three, only Boehm is complaining. The other two are a father, owning a majority, and his son, with a small percentage. There is thus no potential for a multiplicity of shareholder suits. There is also no evidence of any creditor in need of protection, and there is no concern that Boehm's recovery will interfere with a fair distribution of the benefits of the suit. Because none of the underlying reasons for requiring a derivative action are present here, we hold that Boehm was not required to bring a derivative action.

. . . .

Insofar as Boehm relies on claims that Goldsmith violated his fiduciary duties to Boehm as a shareholder in a closely held corporation, these are properly asserted in a direct action because they are based upon rights and duties owed to Boehm, not the corporation. [Citation omitted.]

The standard imposed by a fiduciary duty is the same whether it arises from the capacity of a director, officer, or shareholder in a close corporation. [Citation omitted.] "The fiduciary must deal fairly, honestly, and openly with his corporation and fellow stockholders. He must not be distracted from the performance of his official duties by personal interests." [Citations omitted.] . . .

. . . .

[A]s discussed above, Boehm suffered harm from Goldsmith's breaches of his fiduciary duties to Boehm and may be awarded compensatory damages. We agree with the Court of Appeals that punitive damages are also appropriate. As the Court of Appeals put it:

> Goldsmith deliberately acted, over a period of time, to relegate Boehm to a minority position and effectively "freeze" Boehm out through a denial of dividends. . . . In light of this evidence, we cannot say that the trial court erred in concluding that Goldsmith's conduct was oppressive and malicious . . . . Thus, the award of punitive damages in Boehm's favor was proper.

[Citation omitted.]

. . . .

We agree with the Court of Appeals that Boehm is not entitled to attorney's fees from Goldsmith in his direct action. The "United States Rule" is that parties bear their own fees in the absence of a statute or a basis in quantum merit for reimbursing a party who has benefited others. The direct action by Boehm fits neither category.

We also conclude that he is not entitled to attorney's fees for any derivative claims. . . . [W]e found the direct claims to be the basis of recovery. . . . The theory underlying an award of fees in a derivative suit is that the recovery goes to the corporation as a whole, not the individual shareholder. The shareholder who has performed a service for the corporation by bringing the derivative action is entitled to be paid his fees and expenses incurred in conferring that benefit. But recovery in this case by Boehm conferred no benefit on the corporation as a whole. As Barth noted, one effect of allowing direct actions in closely held corporations is that "the plaintiff, even if successful, cannot ordinarily look to the corporation for attorney's fees." 659 N.E.2d at 563. . . .

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

CLEAR CREEK CONSERVANCY DIST. v. KIRKBRIDE, No. 67S05-0004-CV-00269, ___ N.E.2d ___ (Ind. Mar. 6, 2001).

SULLIVAN, J.

The Clear Creek Conservancy District assessed the Kirkbrides sewer construction costs of $3,800 for each of two lots. Thinking their total liability was $3,800 (rather than $7,600), the Kirkbrides did not object within the time period specified by law. They later asked a court for relief because of their "mistake or excusable neglect." We hold that once the statutory deadline passed, the assessment became final and the court had no authority to grant relief on grounds of mistake or excusable neglect.

. . . .

At issue is whether the principles articulated in Lehnen v. State, 693 N.E.2d 580 (Ind. Ct. App. 1998), transfer denied, 706 N.E.2d 169, a case involving a dispute arising out of an eminent domain action, are applicable to conservancy district assessments. . . .

The Court of Appeals in this case declined to follow Lehnen, finding that, unlike the eminent domain statute, "the legislature [did] not provide[] a similar comprehensive statutory scheme for filing exceptions to appraisers' reports in exceptional benefits assessment actions." Kirkbride, 719 N.E.2d at 855. Based on this distinction, the court concluded that the trial court's order approving the appraisers' report constituted a default judgment and affirmed the trial court's use of Trial Rule 60 in granting relief. Id. We disagree.

Judge Friedlander's dissent in this case was correct when he stated, "[T]he principle to be distilled from Lehnen, i.e., 'when a statute fixes a definite procedure, it must be followed,' applies without regard to the volume or size of the statutes." . . .

. . . .

Similar to the eminent domain procedures, [footnote omitted] the Conservancy Act fixes a definite procedure for the imposition of exceptional benefits assessments. . . .

. . . .

[T]he Kirkbrides were required to take action by filing timely exceptions to the appraisers' report pursuant to Indiana Code § 14-33-8-13 and as explained in the notification sent to them. That is, they were required to file exceptions to the appraisers' report before September 29, 1998, the date of the hearing, in order to contest the exceptional benefits assessment of $7,600. The Kirkbrides do not dispute that they received notification of the hearing detailing the implications of the appraisers' report, but

they neither attended the hearing nor filed exceptions. Consequently, the Kirkbrides are deemed to have acquiesced in the appraisers' report, and it became conclusive as to them.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, RUCKER, JJ., concurred.

GKN CO. v. MAGNESS, No. 49S02-0002-CV-116, ___ N.E.2d ___ (Ind. Mar. 13, 2001).
RUCKER, J.

A truck driver sued his general contractor for injuries sustained while working on a highway construction project. Contending the truck driver was its employee, the general contractor responded with a motion to dismiss for lack of subject matter jurisdiction. According to the general contractor, the truck driver's exclusive remedy rested with the Indiana Worker's Compensation Act. The trial court denied the motion, and the general contractor pursued an interlocutory appeal. Concluding that a majority of the factors outlined by this Court in Hale v. Kemp, 579 N.E.2d 63 (Ind. 1991), weighed in favor of the general contractor, the Court of Appeals reversed in a memorandum decision. GKN Co. v. Magness, No. 49A02-9811-CV-896 (Ind. Ct. App. June 22, 1999). . . . [W]e now affirm the trial court's judgment. In this opinion we hold the following: (1) the factors set forth in Hale must be weighed and balanced against each other; (2) the right of control is the most important factor in determining the existence of an employment relationship; and (3) the allegations in the complaint determine who has the burden of demonstrating the exclusivity of the Indiana Worker's Compensation Act.

. . . .

[T]he standard of appellate review for Trial Rule 12(B)(1) motions to dismiss is indeed a function of what occurred in the trial court. . . .

. . . .

If the facts before the trial court are in dispute, then our standard of review focuses on whether the trial court conducted an evidentiary hearing. . . . [W]here a trial court conducts an evidentiary hearing, we give its factual findings and judgment deference. [Citation omitted.] . . .

[W]here the facts are in dispute but the trial court rules on a paper record without conducting an evidentiary hearing, then no deference is afforded the trial court's factual findings or judgment because under those circumstances a court of review is "in as good a position as the trial court to determine whether the court has subject matter jurisdiction." [Citations omitted.] . . .

In this case, several facts before the trial court were in dispute and just as important even for those facts not in dispute, the parties disagree about the inferences to be drawn from those undisputed facts. Further, the trial court did not conduct an evidentiary hearing, rather it ruled upon a paper record consisting of the parties' complaints, contract, affidavits of witnesses, and excerpts of deposition testimony. Accordingly, in reviewing the factual findings as well as the conclusions of law in this case, we apply a *de novo* standard of review. . . .

. . . .

Determining whether an employer-employee relationship exists ultimately is a question of fact. [Citation omitted.] In making this determination, the fact-finder must weigh a number of factors, none of which is dispositive. This Court has identified the most important of those as: (1) right to discharge; (2) mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and, (7) establishment of the work boundaries. Hale v. Kemp, 579 N.E.2d 63, 67 (Ind. 1991). [Citation omitted.] A number of cases suggest that if a majority of the seven Hale factors is present, then an employer-employee relationship exists. [Footnote omitted.] However, consistent with Hale, we now reaffirm that the factors must be weighed against each other as a part of a

balancing test as opposed to a mathematical formula where the majority wins. As explained in greater detail below, when applying this balancing test, the trial court should give the greatest weight to the right of the employer to exercise control over the employee.

. . . .

As a general proposition, the party challenging subject matter jurisdiction carries the burden of establishing that jurisdiction does not exist. [Citation omitted.] Because there is a strong public policy favoring the coverage of employees under the Act, a number of decisions have declared that once an employer raises the issue of the exclusivity of the Act, the burden automatically shifts to the employee. [Footnote omitted.] However, as Judge Kirsch explains, this public policy is not advanced where its effect "immunize[s] third-party tort feasors and their liability insurers from liability for negligence which results in serious injuries to one who is not in their employ." [Citation omitted.] We agree. . . . [W]hen challenging the trial court's jurisdiction, the employer bears the burden of proving that the employee's claim falls within the scope of the Act unless the employee's complaint demonstrates the existence of an employment relationship. Only where the employee's complaint demonstrates the existence of an employment relationship does the burden then shift to the employee to show some ground for taking the case outside of the Act. [Citation omitted.] Thus, we disapprove of the language in those cases declaring that once an employer raises the issue of the exclusivity of the Act, the burden automatically shifts to the employee. [Citation omitted.]

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

McBAIN v. HAMILTON COUNTY, No. 29A05-0008-CV-343, ___ N.E.2d ___ (Ind. Ct. App. Mar. 9, 2001).

BAILEY, J.

The issue presented by the McBains is whether the Hamilton County Auditor's office provided the McBains with constitutionally sufficient notice of Hamilton County's intention to sell the McBains's property to recover unpaid taxes. . . .

. . . On August 22, 1997, the Hamilton County Auditor's office sent the McBains a Notice of Tax Sale, advising that the McBains's property would be sold to recover the unpaid taxes pursuant to Indiana Code sections 6-1.1-24-1 through –14. (R. 18.) The Notice, which the Auditor's office sent by certified mail to 11630 Rosemeade Drive, was returned by the post office with a notation indicating that the order to forward the McBains's mail to their new address at 7612 Emerald Greens Drive in Cordova, Tennessee had expired. [Citation to Record omitted.] The Auditor's office did not forward the notice to the McBains's Cordova, Tennessee address listed on the returned envelope, believing its obligation to notify the McBains of the anticipated tax sale had been discharged.

. . . .

Indiana Code section 6-1.1-24-4(a) required the Auditor of Hamilton County to send notice of the impending tax sale to the McBains at their "last known address." . . .

. . . .

In Elizondo v. Read, 588 N.E.2d 501 (Ind. 1992), the Indiana Supreme Court addressed the extent to which a county auditor must go to determine a tax-delinquent property owner's address to provide the owner with notice of a tax sale. In Elizondo, the county Auditor mailed notices regarding tax sale proceedings to a tax-delinquent property owner at the owner's most recent address on file in the auditor's office. [Citation omitted.] The notices, however, were returned to the Auditor's office by the post office marked "Unclaimed" or "Undeliverable as addressed. No forwarding order on file." Id. A more recent address for the property owner apparently could have been discovered by searching records in the Auditor's office, and by thumbing through the local phone book, and the property owner argued that the Auditor was affirmatively obligated to find his address from

one of these sources and mail notice to him at that address. [Citation omitted.] The supreme court disagreed, explaining that an Auditor has no obligation to search through telephone directories or other documents or sources of information "not routinely maintained by and within the auditor's office" to discover the property owner's current address. [Citation omitted.] According to the supreme court,

> All that is required is that the auditor send notice to the owner's last known address, that is, the last address of the owner of the specific property in question of which the auditor has knowledge from records maintained in its office.

[Citation omitted.] . . .

In this case, the Auditor's notice failed to meet the requirements in both Elizondo and Mullane [v. Central Hannover Bank & Trust, 339 U.S. 306 (1950)]. When the Auditor's Notice of Tax Sale was returned with the McBains's more recent Cordova, Tennessee address, the Auditor's office had what at that time became McBains's last known address, an address unquestionably linked to the McBains and to the property in question by virtue of its location on the returned envelope containing the original Notice of Tax Sale. Under Elizondo, an Auditor may not disregard such information, and must send notice of the tax sale proceedings to the property owner at that subsequently discovered alternate address. . . .

. . . .

FRIEDLANDER and MATTINGLY, JJ., concurred.

E & L RENTAL EQUIP., INC. v. GIFFORD, No. 46A04-0008-CV-321, ___ N.E.2d ___ (Ind. Ct. App. Mar. 12, 2001).

RILEY, J.

E & L argues that Gifford assigned his claim to the Commissioner of Labor and as a result Gifford was not the real party in interest to bring this action in the trial court. We agree.

. . . .

Thus, the issue becomes whether as a result of this assignment, Gifford was not the real party in interest to bring this action in the trial court. . . . Here, Gifford completely assigned his wage claim to the Commissioner of Labor, [footnote omitted] and although he was entitled to any amounts recovered by the Commissioner of Labor, the Commissioner of Labor was the proper party to bring this action.

. . . .

In light of our standard of review, we conclude that E & L has presented a *prima facie* showing of reversible error in that Gifford was not the real party in interest to bring this action. [Citation omitted.]

. . . .

DARDEN, J., concurred.

ROBB, J., filed a separate written opinion in which she dissented, in part, as follows:

I respectfully dissent. . . . [T]he record does not reflect that E & L objected in the trial court to Gifford's status as the real party in interest, nor that the Commissioner of Labor was ever informed of the pending action such that he could choose to ratify or join the action. As such, I do not believe that a Trial Rule 12(B)(6) dismissal is appropriate in this case. . . .

RITTER v. STANTON, No. 49A02-9912-CV-883, ___ N.E.2d __ (Ind. Ct. App. Mar. 14, 2001).

BARNES, J.

[S]tanton was a truck driver for Gateway Freightline . . . a wholly owned subsidiary of Kroger. . . . Ritter, a Kroger employee, began backing a Kroger tractor toward the same parked trailer. Unaware that Ritter was moving toward him, Stanton walked between

Ritter's backing tractor and the parked trailer. After Stanton stopped momentarily, he was pinned between the parked trailer and Ritter's tractor, suffering massive injuries.

. . . .

After deliberating for a relatively short time, the jury returned a verdict in favor of the Stantons for $55,000,000, which reflected a 20% reduction or discount for Stanton's comparative fault.

. . . .

[W]e find that the collective bargaining agreement and the K-Plan do not create a contractual relationship sufficient to bring this case outside the scope of the McQuade holding. Therefore, we conclude that the trial court properly denied Kroger's motion to dismiss because Stanton's claim is not barred by the exclusivity provision of the [Workman's Compensation] Act. [Footnote omitted.]

. . . Although Kroger admits that Stanton was seriously and permanently injured, it maintains that the award is excessive and that we should either remit it or remand the case for a new trial on damages. Kroger contends that the verdict was motivated by passion, prejudice, or partiality and that the evidence does not support such a large award. [Footnote omitted.]

. . . .

Kroger contends that a "comparability" analysis is appropriate whereby we would compare this verdict to similar cases in Indiana and across the country, particularly those that are similar with respect to pain and suffering and loss of consortium. . . .

. . . .

[I]ndiana has not heretofore adopted the comparability analysis for evaluating compensatory damage awards. . . .

The vast majority of Indiana cases simply consider whether the verdict was reasonable in light of the evidence presented at trial. . . .

. . . .

If a comparability analysis is applied to reduce awards exceeding the range of purportedly similar cases, the effects are far-reaching. Because a comparability analysis effectively places a "cap" on the jury's award regardless of the evidence, it can be considered to be second-guessing jury decisions in a manner not permitted by the Seventh Amendment. Without express statutory authority, no decisionmaker should have the power to alter a jury's award without regard for the evidence. . . .

. . . .

We recognize that there is a public policy concern with respect to seemingly excessive jury verdicts [footnote omitted] and believe that verdicts not supported by the evidence must be set aside or reduced as violative of the law. In so doing, some type of comparative analysis may, under certain circumstances, be necessary to evaluate particular types of damages or to determine whether the size of a particular verdict indicates jury passion or prejudice. Although it may be tempting to engage in such a comparative analysis to aid us in the difficult task of evaluating such a large award as is at issue in this case, to do so would be a significant departure from Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the discretion of the factfinder. . . .

. . . .

It is clear from the amount of the verdict that the extensive testimony and evidence had a profound effect on the jury. We conclude that it adequately supports the amount of damages awarded. [Footnote omitted.] . . .

. . . .

The record contains extensive evidence, including graphic photographs, of Stanton's massive, permanent injuries that have prevented any sort of normal life for him and his family and cause him constant pain. In addition, Kroger defended itself at trial on the basis

that Stanton was totally at fault for the accident. In fact, Kroger's expert insisted that Ritter was not at all responsible for the accident and even agreed with Stanton's counsel's characterization of Ritter as being "innocent as a newborn babe that wasn't even on the scene." [Citation to Record omitted.] In light of the testimony of Kroger's own supervisor, whose investigation of the accident resulted in the conclusion that Ritter was at fault for the accident and that Stanton was partially at fault, Kroger's continued insistence that Ritter bore no responsibility for the accident could have made a particularly strong impression on the jury. . . .

. . . .

Kroger makes a brief attempt to argue that the size of the award violates due process and equal protection under the United States Constitution and due course of law under the Indiana Constitution. Kroger contends that an unfettered right to a jury trial in civil cases does not equate to the unfettered right to award any amount of damages.

Kroger's due process and due course of law challenges essentially amount to the contention that because the award was "grossly excessive," Kroger had no notice that such an award of general damages was even remotely reasonable or possible. . . . Kroger was not deprived of notice simply because this verdict was higher, even substantially higher, than others like it because every case ultimately depends on the evidence presented in that particular case. . . .

. . . .

[W]e are unpersuaded that the jury verdict in this case is great enough to be characterized as so excessive as to indicate prejudice. We cannot say as a matter of law that the suffering of Stanton and his wife is worth less than the jury's award, and where there is credible evidence to sustain the jury's discretion, we will not find that discretion abused.

BAILEY and RILEY, JJ., concurred.

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Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
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